Docket No.: ORM 156CO
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Eric Chapoulaud et al.

Application No.: 09/941,151   Confirmation No.: 4585

Filed: August 28, 2001   Art Unit: 3732

For: Custom Orthodontic Appliance Forming Method   Examiner: H. M. Eide
       and Apparatus

APPEAL BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

As required under § 41.37(a), this brief is filed within two months of the Notice of
Appeal filed in this case on August 2, 2010, and is in furtherance of said Notice of Appeal.

The fees required under § 41.20(b)(2) are dealt with in the accompanying EFS-WEB
transmittal.

This brief contains items under the following headings as required by 37 C.F.R. § 41.37
and M.P.E.P. § 1205.2:

I.	Real Party In Interest
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I.   REAL PARTY IN INTEREST

The real party in interest for this appeal is: Ormco Corporation

II.   RELATED APPEALS AND INTERFERENCES

There are no other appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III.   STATUS OF CLAIMS

A.   Total Number of Claims in Application

There are 13 claims pending in application.

B.   Current Status of Claims

1.   Claims canceled: 1-119

2.   Claims withdrawn from consideration but not canceled: NONE

3.   Claims pending: 120-132

4.   Claims allowed: NONE

5.   Claims rejected: 120-132

C.   Claims On Appeal

The claims on appeal are claims 120-132.

IV.   STATUS OF AMENDMENTS

Applicant did not file an Amendment After Final Rejection.

V.   SUMMARY OF CLAIMED SUBJECT MATTER

Independent Claim 120 is described in the specification on page 9, line 36 to page 10, line 15, and Fig. 1, reference number 14 (orthodontist), 13 (design facility), 30b (computer at design facility), 32 (computer at the orthodontist), and 31 (link between the computer 30b and computer 32). As recited in the specification, "the initial determinations of finish position

produce a precise prediction of the prescribed treatment, taking into account the programmed algorithms and the exact three-dimensional shapes of the tooth surfaces." In the claim language, there is "provid[ed] for display on a computer screen, with interaction by an operator, data of images of the teeth of the patient in suggested post-treatment tooth positions and orientations that are based on three-dimensional information of the shapes of the teeth of the patient." Then, per the specification, "[a]n image of the proposed treatment result is communicated digitally to the orthodontist 14 through a computer network or other data link 31 connected between the design facility 13 and an interactive computer terminal 32 at the office 11 of the orthodontist 14." At the orthodontist facility, as stated in the specification, "the orthodontist can manipulate the initial determinations of calculated treatment positions as well as the course of treatment in response to which the design computer 30b recalculates the final treatment positions of the teeth and generates display data for further review." In the claim language, the orthodontist's manipulation is and the recalculation at design computer 30b is the step of "receiving feedback information on the suggested post-treatment positions and orientations, from a person, other than the operator, who has interactively viewed a display of the provided images on the computer screen." Per the specification, "[o]nce the tooth treatment positions are approved by the orthodontist 14, the computer 30b automatically designs the appliance under the supervision of an operator 28." In the claim language, this is the step of "providing a custom orthodontic appliance configured to reposition teeth of the patient based on the suggested tooth positions and orientations in accordance with the feed back information."

Independent Claim 124 is described in the specification on page 9, line 36 to page 10, line 15, and Fig. 1, reference number 14 (orthodontist), 13 (design facility), 30b (computer at

design facility), 32 (computer at the orthodontist), and 31 (link between the computer 30b and

computer 32). As recited in the specification, "the initial determinations of finish position

produce a precise prediction of the prescribed treatment, taking into account the programmed

algorithms and the exact three-dimensional shapes of the tooth surfaces." In the claim language,

there is "provid[ed] for display on a computer screen images of the teeth of the patient in

suggested post-treatment tooth positions and orientations that are based on three-dimensional

information of the shapes of the teeth of the patient." Then, per the specification, "[a]n image of

the proposed treatment result is communicated digitally to the orthodontist 14 through a

computer network or other data link 31 connected between the design facility 13 and an

interactive computer terminal 32 at the office 11 of the orthodontist 14." At the orthodontist

facility, as stated in the specification, "the orthodontist can manipulate the initial determinations

of calculated treatment positions as well as the course of treatment in response to which the

design computer 30b recalculates the final treatment positions of the teeth and generates display

data for further review." In the claim language, the orthodontist's manipulation is and the

recalculation at design computer 30b is the step of "receiving feedback information on the

suggested post-treatment positions and orientations from a person who has interactively viewed a

display of the provided images on a computer screen." In the initial case where the orthodontist

manipulates the image, the feedback is in the form recited in the claim as "information changing

at least one of the suggested post-treatment tooth positions or orientations". Per the

specification, "[o]nce the tooth treatment positions are approved by the orthodontist 14, the

computer 30b automatically designs the appliance under the supervision of an operator 28." This

case, where the orthodontist provides approval, is recited as "information approving at least

some of the suggested post-treatment positions and orientations." The subsequent step of

automatic appliance design, is recited in the claim language, in the step of "providing a custom orthodontic appliance configured to reposition teeth of the patient based on the suggested tooth positions and orientations in accordance with the feedback information."

Independent Claim 129 is described in the specification on page 9, line 36 to page 10, line 15, and Fig. 1, reference number 14 (orthodontist), 13 (design facility), 30b (computer at design facility), 32 (computer at the orthodontist), and 31 (link between the computer 30b and computer 32). As recited in the specification, "the initial determinations of finish position produce a precise prediction of the prescribed treatment, taking into account the programmed algorithms and the exact three-dimensional shapes of the tooth surfaces." In the claim language, there is "provid[ed] digital data of suggested post-treatment tooth positions and orientations of the teeth of the patient that are based on three-dimensional information of the shapes of the teeth of the patient." Then, per the specification, "[a]n image of the proposed treatment result is communicated digitally to the orthodontist 14 through a computer network or other data link 31 connected between the design facility 13 and an interactive computer terminal 32 at the office 11 of the orthodontist 14." In the claim language, this is recited in t step of "providing images of the teeth of the patient from the digital data, for display on at least one computer screen to an orthodontic practitioner in the suggested post treatment tooth positions and orientations for either (a approval for use in creating a custom orthodontic appliance for the patient or (b revision." As stated in the specification, "the orthodontist can manipulate the initial determinations of calculated treatment positions as well as the course of treatment in response to which the design computer 30b recalculates the final treatment positions of the teeth and generates display data for further review." In the claim language, the orthodontist's manipulation is recited as "receiving

from an orthodontic practitioner, who has interactively viewed on a computer screen a display of the provided images, feedback information approving the suggested post-treatment positions and orientations." Per the specification, "[o]nce the tooth treatment positions are approved by the orthodontist 14, the computer 30b automatically designs the appliance under the supervision of an operator 28." In the claim language, this is the step of "providing a custom orthodontic appliance configured to the individual anatomy of the patient to reposition teeth of the patient based on the suggested post-treatment tooth positions and orientations approved in accordance with the feed back information."

VI.   GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claims 120-132 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chishti et al. (5,975,893) in view of Lehmann et al. (6,575,751).

Claims 120-132 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chishti et al. (5,975,893) (Chishti) in view of Hultgren 6,217,334 further in view of Peltz 6,205,716.

VII.   ARGUMENT

Claims 120-132 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Chishti et al. U.S. Patent No. 5,975,893 (*Chishti*) in view of Lehmann et al. U.S. Patent No. 6,575,751 (*Lehmann*), or, alternately, Chishti in view of Hultgren U.S. Patent 6,217,334 (*Hultgren*) and further in view of Peltz U.S. Patent 6,205,716 (*Peltz*). Applicants will focus on the independent claims in this case, namely, claims 120, 124 and 129. Claim 120 recites a method of providing a custom orthodontic appliance comprising the steps of:

> providing for display on a computer screen, with interaction by an operator, data of images of the teeth of the patient in suggested post-treatment tooth positions and orientations that are based on three-dimensional information of the shapes of the teeth of the patient;
>
> receiving feedback information on the suggested post-treatment positions and orientations from a person, other than the operator, who has interactively viewed a display of the provided images on the computer screen; and
>
> providing a custom orthodontic appliance configured to reposition teeth of the patient based on the suggested tooth positions and orientations in accordance with the feedback information.

Claim 124 provides a more detailed recitation of the form of the feedback received; specifically, it recites:

> wherein the feedback information includes one or more of:
>
> information approving at least some of the suggested post-treatment positions and orientations , and
>
> information changing at least one of the suggested post-treatment tooth positions or orientations;

Finally, claim 129 similarly recites the creation of "suggested post treatment positions" and "receiving from an orthodontic practitioner, who has interactively viewed on a computer screen a display of the provided images, feedback information approving the suggested post-treatment positions and orientations".

Chishti et al.

The Examiner relies upon Chishti as a primary reference in all rejections. The Examiner asserts in the Final Action that Chishti et al discloses a method for:

> providing for display on a computer screen, with interaction by an operator (user), data of images of the teeth of the patient in suggested post treatment tooth positions and orientations (final digital data) based on three-dimensional information of the shapes of the teeth (column 5 line 37), receiving feedback information from a person (treating professional), other than the operator, and providing a custom orthodontic appliance configured to reposition teeth based on the suggested post treatment tooth positions and orientations.

The Examiner goes on to state "there is suggestion as to various times when 'users' can provide

feedback as in information to modify (change) or accept (not change) tooth positions and

orientations in obtaining post-treatment tooth positions and orientations (columns 4-7, 9-14)."

Applicant respectfully submits that the Examiner is incorrect as to what Chishti

teaches. Chishti, at col. 5, states that an operator creates a final tooth position by various

adjustments and manipulations, but never states that there is a step of feedback from an

orthodontic practitioner, or any other person than the original operator, or the creation of a

'suggested final tooth position' that could lead to such feedback. Rather, the (limited)

involvement of the practitioner is clearly spelled out at col. 6 lines 1-11:

> A preferred method for determining the final tooth arrangement is for the
> treating professional to define the final tooth positions, e.g., by writing a
> prescription. The use of prescriptions for defining the desired outcomes of
> orthodontic procedures is well known in the art. When a prescription or other
> final designation is provided, the image can then be manipulated to match the
> prescription. In some cases, it would be possible to provide software which could
> interpret the prescription in order to generate the final image and thus the digital
> data set representing the final tooth arrangement. [emphasis added]

See also col. 10, lines 35-37: "the user will often follow a prescription or other

written specification provided by the treating professional." Thus, contrary to the Examiner's

assertion, Chishti does not show, after the development of an image, feedback on the image from

a treating professional or other third party, as claimed herein. Rather, Chishti suggests that,

initially, a prescription would be written by the treating professional (as such has been done for

many years), and then a computer operator would implement that prescription. There is no

suggestion in this process of feedback from the orthodontic practitioner upon viewing images of

a suggested final position – the orthodontic practitioner starts the process with a written

prescription and is not described in participating at all in the image manipulation. Thus, nothing

in Chishti meets the claim 120 recitation of "receiving feedback information on the suggested post-treatment positions and orientations from a person, other than the operator, who has interactively viewed a display of the provided images on the computer screen", and similar language of claims 124 and 129.

Lehmann

The Examiner has relied upon the Lehmann patent for its reference to a person using the services of another to perform computing tasks. Applicant submits that Lehmann would not modify the process Chishti teaches: in the Chishti process, an orthodontic practitioner writes a prescription which is implemented via the computer by another person. Lehmann would only reinforce this process – i.e., lead to a person other than the orthodontic practitioner operating the computer, exactly as is done in Chishti. The combination would not lead to the missing step of providing feedback from someone who has interactively viewed a display of images of a suggested final tooth position, as this would involve the treating professional in the computer operations, contrary to both references.

Rule 131 Declarations to Remove Lehmann

Lehmann has an effective filing date no earlier than November 1998, and thus is not prior art to the present claims as established by the various declarations under Rule 131 filed by Applicant, which are included in Appendix B of this Appeal Brief.

Mr. Jordan's declarations of December 1, 2003 and March 28, 2007 relate Mr. Jordan's personal recollection and documentation of a reduction to practice by the inventors Andreiko and Chapoulaud, that Mr. Jordan witnessed at the Ormco facility prior to October 8, 1998.

Specifically, Mr. Jordan notes that he witnessed Mr. Chapoulaud "interactively operated the computer and demonstrated to me the software for designing a custom orthodontic appliance for repositioning the teeth of a patient ... as images including those corresponding to the original slides were displayed on the computer display." Jordan further notes that "suggested positions and orientations ... were displayed on Eric's computer as images including images corresponding to Figs. 5B, 5C and 5D of the present application." (See paragraph 4) Jordan then notes that "Dr. Andreiko participated in the demonstration" and the "explanation of Dr. Andreiko included the viewing by Dr. Andreiko and me of the images displayed on a computer screen, including the screen image depicted in Fig. 5C of the present application. Through a keyboard and mouse attached to the computer, Dr. Andreiko interacted with the viewed image to feed back information to the computer before the design of the custom orthodontic appliance. .... Dr. Andreiko demonstrated the interactive entry of feedback information by selecting, with a mouse, one of the twenty-eight teeth of the patient by way of the controls 76 in the image of Fig. 5C. .... Dr. Andreiko caused the computer to recalculate the post-treatment positions and orientations, that is, to calculate revised post-treatment positions and orientations, of the teeth."

Although Mr. Jordan is not an inventor, Applicant notes that the December 1, 2003 Jordan declaration described above is corroboration to a declaration of the inventor Dr. Craig Andreiko, also signed on December 1, 2003.[1]

In Dr. Andreiko's declaration, in paragraph 2, Dr. Andreiko relates that he "participated in the making of the slides referred to in [Mr. Jordan's] declaration and the sending

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[1] Applicant notes that Rule 131 does not prohibit the submission of non-inventor declarations as part of a submission under Rule 131. Indeed, Applicant submits that there is evidentiary value in a non-inventor declaration that supports and corroborates an inventor's declaration, as Applicant has provided here. Applicant does not, therefore, believe that the Jordan declaration is noncompliant with Rule 131.

of the slides to him." Dr. Andreiko also states that "I was present at the demonstration, referred to in his declaration, of the software to him by Eric Chapoulaud". In paragraph 5, Dr. Andreiko states that in the demonstration "the person viewing the display, in this case Eric, clicked on the command button to initiate the 'set-up', in response to which the computer calculated finish positions. ... The software operated to accept any changes or adjustments to the calculated tooth positions or orientations and to recalculate finish positions based on the adjustments entered through the controls on the display by the person viewing the display."

Moreover, the Declaration of Eric Chapoulaud filed April 21, 2009 further supports the predating of the Lehmann patent. It explains a method practiced on February 12 and 13 of 1998 to generate Exhibits U and V: in the claim chart on page 17 et seq. Mr. Chapoulaud explains that "the process documented in Exhibits U and V involved the creation of landmarks by me and the creation of feedback on those landmarks by Dr. Andreiko in the form of alternative landmarks that would alter post-treatment positions." (emphasis added) Notably, the process thus involved the interactive viewing of displayed treatment positions by both Dr. Andreiko and Mr. Chapoulaud, where the landmarks of Dr. Andreiko were feedback on the images he had seen from Mr. Chapoulaud's efforts. Exhibits U and V show that this process was performed in February 1998, thus predating the Lehmann reference and showing that the inventors had conceived and implemented at least as much as Lehmann discloses.[2]

Applicant thus submits that the declarations presented establish the reduction to practice of the claimed invention, including the creation of a set-up by an operator, the

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[2] In the Final Action, at the bottom of page 4, the Examiner appears to assert that "feedback" requires that a person other than the operator change the initial, suggested image to a second image. However, the claim language at issue does not recite that the feedback must be changing the first image to a second image. The claims recite only that feedback information is received from a person who has reviewed displayed images, and then a custom appliance or second image is created as an end result of that feedback. The feedback does not need to be in the form of the first image, modified by someone other than the operator.

modification of that setup by a person other than the operator, and the creation of a custom appliance based on the modified setup, prior to the effective date of Lehmann. Applicant believes that the declarations are in compliance with Rule 131 and establish the reduction to practice at a date prior to October 4, 1998, thus predating the Lehmann et al. '751 patent relied upon by the Examiner.

>Hultgren and Peltz

The Examiner's second alternative rejection relies upon Hultgren and Peltz combined with Chishti. Hultgren is relied upon for showing remote transmission of dental tooth model data. As such, this would inspire no change to the Chishti process, other than that a plaster cast might be digitized remotely by the orthodontist's office, rather than mailed. The Examiner also cites Peltz for teaching "interaction communication between a user and a medical professional". However, Peltz only shows the use of videoconferencing to consult with remote professionals on medical, legal or confidential matters. There is nothing specific to orthodontia or dental practice in Peltz, rather, just the suggestion to allow the remote consultation with professionals in a private booth or kiosk. Applicant cannot see how Peltz would cause modification of Chishti, other than, perhaps, to allow an orthodontic practitioner to talk to patients about the status of their case remotely, or to allow the practitioner to convey a prescription verbally rather than in writing. Peltz would <u>not</u> change the Chishti's process of implementing a prescription, in which a practitioner writes a <u>before</u> creating an final data set image, and does not feedback <u>after</u> the data set is created.

Conclusion

As seen from the foregoing, attention to the details of the claimed invention and the prior art reveals that the rejections are plainly in error. It is respectfully submitted the rejections should be withdrawn and the case allowed.

A copy of the claims involved in the present appeal is attached hereto as Appendix A. As indicated above, the claims in Appendix A include the amendments filed by Applicant on December 30, 2009.

Applicant believes no fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 23-3000, under Order No. ORM 156CO from which the undersigned is authorized to draw.

Dated: November 2, 2010   Respectfully submitted,

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APPENDIX A – CLAIMS

Claims Involved in the Appeal of Application Serial No. 09/941,151

1-119. (CANCELED)

120. (PREVIOUSLY PRESENTED) A method of providing a custom orthodontic appliance for repositioning teeth of a patient, the method comprising:

providing for display on a computer screen, with interaction by an operator, data of images of the teeth of the patient in suggested post-treatment tooth positions and orientations that are based on three-dimensional information of the shapes of the teeth of the patient;

receiving feedback information on the suggested post-treatment positions and orientations from a person, other than the operator, who has interactively viewed a display of the provided images on the computer screen; and

providing a custom orthodontic appliance configured to reposition teeth of the patient based on the suggested tooth positions and orientations in accordance with the feed back information.

121. (PREVIOUSLY PRESENTED) The method of claim 120 wherein:

the person viewing the display of the images is an orthodontic practitioner; and

the feedback information includes information of approval by the orthodontic practitioner of the suggested post-treatment tooth positions and orientations toward which the teeth of the patient are to be moved by the appliance.

122. (PREVIOUSLY PRESENTED) The method of claim 120 wherein:

the feedback information includes information of a change in position or orientation of at least one tooth from the suggested post-treatment tooth positions and orientations toward which the at least one tooth of the patient is to be moved by the appliance.

123. (PREVIOUSLY PRESENTED) The method of claim 122 further comprising:

providing revised images of the teeth of the patient for redisplay in revised post-treatment tooth positions and orientations based on the suggested tooth positions and orientations as changed in accordance with the feedback information.

124. (PREVIOUSLY PRESENTED) A method of providing a custom orthodontic appliance configured to the individual anatomy of a patient for repositioning teeth of the patient, the method comprising:

providing for display on a computer screen images of the teeth of the patient in suggested post-treatment tooth positions and orientations that are based on three-dimensional information of the shapes of the teeth of the patient;

receiving feedback information on the suggested post-treatment positions and orientations from a person who has interactively viewed a display of the provided images on a computer screen wherein the feedback information includes one or more of:

information approving at least some of the suggested post-treatment positions and orientations , and

information changing at least one of the suggested post-treatment tooth positions or orientations; and

providing a custom orthodontic appliance configured to reposition teeth of the patient based on the suggested post-treatment tooth positions and orientations in accordance with the feedback information.

125. (PREVIOUSLY PRESENTED) The method of claim 124 further comprising:

providing revised images of the teeth of the patient in revised post-treatment tooth positions and orientations based on the suggested post-treatment tooth positions and orientations as changed in accordance with the feedback information.

126. (PREVIOUSLY PRESENTED) The method of claim 125 further comprising:

receiving from a person who has viewed a display of the provided revised images feedback information approving the revised post-treatment tooth positions and orientations toward which the teeth of the patient are to be moved by the appliance.

127. (PREVIOUSLY PRESENTED) The method of claim 124 further comprising:

providing the person viewing the display with a capability to enter the feedback information.

128. (PREVIOUSLY PRESENTED) The method of claim 124 wherein: the person viewing the display of the images is an orthodontic practitioner.

129. (PREVIOUSLY PRESENTED) A method of providing a custom orthodontic appliance, configured to the individual anatomy of a patient, for orthodontically repositioning teeth of the patient, the method comprising:

providing digital data of suggested post-treatment tooth positions and orientations of teeth of the patient that are based on three-dimensional information of the shapes of the teeth of the patient;

providing images of teeth of the patient from the digital data, for display on at least one computer screen to an orthodontic practitioner in the suggested post treatment tooth positions and orientations for either (a approval for use in creating a custom orthodontic appliance for the patient or (b revision;

receiving from an orthodontic practitioner, who has interactively viewed on a computer screen a display of the provided images, feedback information approving the suggested post-treatment positions and orientations; and

providing a custom orthodontic appliance configured to the individual anatomy of the patient to reposition teeth of the patient based on the suggested post-treatment tooth positions and orientations approved in accordance with the feedback information.

130. (PREVIOUSLY PRESENTED) The method of claim 129 wherein the receiving of the feedback information approving the suggested post-treatment positions and orientations for a custom orthodontic appliance for the patient includes:

receiving from an the orthodontic practitioner, who has interactively viewed on a computer screen a display of the provided images, feedback information of revisions to the suggested post-treatment positions and orientations;

providing further images of teeth of the patient based on the three dimensional information, for redisplay on the computer display device to the orthodontic practitioner, in suggested post-treatment tooth positions and orientations that have been changed in accordance with the feedback information of the revisions; and

receiving from the orthodontic practitioner, who has viewed a redisplay of the provided further images on a computer screen, the feedback information approving the suggested post-treatment positions and orientations, as changed in accordance with the feedback information of the revisions.

131. (PREVIOUSLY PRESENTED) The method of claim 130 wherein: the providing of digital data of suggested post-treatment tooth positions and orientations of teeth of the patient that are based on three-dimensional information of the shapes of the teeth of the patient includes providing for display on a computer screen, with interaction by an operator, the digital data; and

the orthodontic practitioner who has interactively viewed on a computer screen a display of the provided images is a person other than the operator.

132. (PREVIOUSLY PRESENTED) The method of claim 130 wherein:

the receiving of feedback information from an orthodontic practitioner approving the suggested post-treatment positions and orientations includes receiving feedback information

wherein the feedback information can include either information approving the suggested post-treatment tooth positions and orientations or information modifying at least one of the suggested post-treatment tooth positions or orientations.

APPENDIX B- EVIDENCE

The follow evidence pursuant to §§ 1.130, 1.131, or 1.132, which has been entered by or relied upon by the Examiner, is being submitted herewith:

Declaration of Craig A. Andreiko filed December 2, 2003;

Declaration of Joseph R. Jordan filed December 2, 2003;

Declaration of Joseph R. Jordan filed March 28, 2007;

Declaration of Eric Chapoulaud filed April 21, 2009;

Declaration of Craig A. Andreiko filed April 21, 2009;

Declaration of Mark A. Payne filed April 21, 2009.

APPENDIX C – RELATED PROCEEDINGS

No related proceedings are referenced in II. above, hence copies of decisions in related proceedings are not provided.